82-681

No.

Office - Supreme Court, U.S.
FILED
OCT 19 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

EDWARD LEE HORTON, a/k/a "CORNBREAD" HORTON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS F. LONDRIGAN

ALEXANDRA de SAINT PHALLE
LONDRIGAN & POTTER, P.C.
1227 South Seventh Street
Post Office Box 399
Springfield, Illinois 62705
Telephone: 217/544-9823

CASEY & CASEY
Attorneys at Law
2020 Timberbrooke
Springfield, Illinois 62702
Telephone: 217/787-1536

Attorneys for Petitioner,
EDWARD LEE HORTON

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED FOR REVIEW

1. May the Government, pursuant to §3161(h)(6) of the Speedy Trial Act, deny a Defendant's right to thirty (30) days preparation time for trial on a valid indictment under the Speedy Trial Act by seeking its own dismissal of an invalid original indictment and substituting for it a "barely sufficient" reindictment six (6) days before trial, before the trial court rules on Defendant's outstanding motion to dismiss the original indictment?

2. Do §§3161(c), (d) and (h) of the Speedy Trial Act guarantee a Defendant thirty (30) days preparation time in the event of a reindictment or in the event of applicable exclusions under §3161(h) as decided by the Ninth Circuit Court of Appeals in *United States* v. *Arkus*, 675 F.2d 245 (9th Cir. 1982) as opposed to the Seventh Circuit's decision to the contrary in this case?

NAMES OF PARTIES

In addition to the Defendant, Edward Lee Horton, a/k/a "Cornbread" Horton, and the Plaintiff, United States of America, Bragster G. Horton was a defendant in the proceeding involved in the Seventh Circuit Court of Appeals. Bragster Horton has not joined in this Petition for Writ of Certiorari.

TABLE OF CONTENTS

	PAGE
Questions Presented for Review	i
Names of Parties	i
Table of Authorities	iv
Citation To Opinions Below	1
Jurisdiction	1
Statement of Facts	6
1. Trial Court Proceedings	6
2. Appellate Court Proceedings	10
Basis for Federal Jurisdiction in the Trial Court	11
Argument	12
I. Certiorari is warranted to clarify the conflicting approaches taken by the Third and Seventh Circuits to construction of the Speedy Trial Act	12
II. Review is warranted by this court in the exercise of its supervisory role to prevent judicial erosion of Congress' mandate to allow a defendant sufficient time to adequately prepare a defense	16

PAGE

III. Review is warranted to resolve a direct conflict between circuits on construction of the Speedy Trial Act on whether the exclusions provided in §3161(h) are applicable to the 30 day minimum periods as well as to the 70 day maximum periods of §3161(c) 20

Conclusion 23

APPENDIX—

A Opinion of the Court of Appeals for the Seventh Circuit, April 29, 1982 .....App. 1

B Judgment order on April 29, 1982 .....App. 25

C Order denying Petition for Rehearing and Rehearing En Banc on July 21, 1982 .....App. 27

D Order granting extension of time for filing .. Petition for Writ of Certiorari .....App. 29

TABLE OF AUTHORITIES

Cases

PAGE

Perez v. United States, 402 U.S. 146 (1971) 18

United States v. Arkus, 675 F.2d 245 (9th Cir. 1982) 10, 20, 21, 22

United States v. MacDonald, — U.S. —, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) 17

United States v. Rabb, 680 F.2d 294 (3rd Cir. 1982) 13, 14, 15

United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1979) 8

United States v. Wooten, #81-5166-81-268 (4th Cir. 1982) 22

Statutes

18 U.S.C. §891 ..... 4, 6

18 U.S.C. §894 ..... 5, 6, 9, 11

18 U.S.C. §924(c) 6, 11

18 U.S.C. §1952(a)(12) 6

18 U.S.C. §3161(b) 14

18 U.S.C. §3161(c)(1) 2, 20

18 U.S.C. §3161(c)(2) 2, 16, 18, 20, 22

18 U.S.C. §3161(d) 16

18 U.S.C. §3161(d)(1) 2, 13

18 U.S.C. §3161(h) 20, 21, 22

18 U.S.C. §3161(h)(1)(F) 3, 20

PAGE

18 U.S.C. §3161(h)(1)(H) 3, 20

18 U.S.C. §3161(h)(6) 3

18 U.S.C. §3162 15

18 U.S.C. §3163 15

Other Authorities

Legislative History of Title I of the Speedy Trial Act of 1974, A. Partridge (Federal Judicial Center 1980) 13, 19, 22

In the
Supreme Court of the United States

OCTOBER TERM, 1982

NO.

EDWARD LEE HORTON, a/k/a "CORNBREAD" HORTON

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CITATION TO OPINIONS BELOW

The judgment on review was printed in a slip opinion issued by the Seventh Circuit Court of Appeals on April 29, 1982, and appears in the *Federal Reporter* at 676 F.2d 1165. No opinions by the Trial Court were published. The Seventh Circuit's Opinion is reprinted in the Appendix to this Petition.

JURISDICTION

1. The date of entry of the judgment sought to be reviewed was April 29, 1982.

2. A rehearing and rehearing en banc were denied on July 21, 1982. A Petition for Extension of Time to file a Petition for Writ of Certiorari was granted by this Court until and including October 19, 1982 on September 8, 1982.

3. There is statutory jurisdiction for this action pursuant to 28 U.S.C. §1254(1).

APPLICABLE STATUTES

Chapter 208—Speedy Trial

18 U.S.C.—Time Limits and Exclusions.

* * *

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(c)(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed

against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

* * *

(h)(1) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

* * *

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

* * *

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable.

* * *

(h)(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same

offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

Chapter 42—Extortionate Credit Transaction

18 U.S.C. §891—Definitions and Rules of Construction

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

18 U.S.C. §894—Collection of Extensions of Credit by Extortionate Means

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

STATEMENT OF FACTS

1. Trial Court Proceedings.

Edward Horton was indicted with multiple offenses of extortionate collection of credit in a 15 count indictment filed September 24, 1980.[1] Although involving six different victims at four different times spanning several months,

---

[1] Specifically violations of the following U.S. criminal statutes were alleged. 18 U.S.C. §§894, 924(c), 1952(a)(2) and 891.

the indictment contained no names of any of the victims, no location of any of the alleged crimes, nor any explanation whatsoever regarding the extensions of credit involved in the extortion offenses.[2] At a bond reduction hearing held two days later, the United States Attorney informed the Court and Defendant that the alleged extensions of credit involved in Counts I-VI related to a dispute over stolen goods.

> "One other comment that I would advise the Court as to the incident of July of '79 is that these two individuals were not unknown to Mr. Horton and to the co-Defendants, the other associates who were there. In fact, they had been business associates of Mr. Horton in the sense that the purpose of their trip to Mr. Horton's that day was to deliver stolen merchandise, and they had done that in a—on previous occasions. *The argument about the debt and the amount owing to Mr. Horton arose out of their relationship with Mr. Horton in the disposing of stolen merchandise.*"
> (Tr. 9/26/80, p. 24) (Emphasis added)

However, at trial the Government contended that the alleged extension of credit involved approximately seven bad checks and approximately ten to fifteen others given for the sale of heroin. The Supplemental Record filed by the Government on Appeal in this case revealed that the Government had knowledge of these checks and the subject matter for which they were given at least a month prior to the indictment. (Motion to Supplement the Record on Appeal, filed October 14, 1981)

During the pretrial proceedings, the Defendant was hospitalized for thirty days at Springfield, Missouri, from

---

[2] For a representative sample of the Counts included in the indictment, see note 1 in Judge Swygert's dissent in the Seventh Circuit's opinion contained in the Appendix to this Petition at p. 18.

October 7 to November 7, 1980. On November 7, he was returned to Springfield, Illinois, but then was immediately transferred by the Government to a jail in Danville, Illinois (120 miles away from Springfield). On November 10, 1980, the trial court denied a request by Defendant's counsel to make him available to counsel in Springfield so that they could prepare for the trial set for November 24, 1980.

In the meantime (October 23 and October 8, respectively), Defendant's counsel had filed a motion to dismiss the indictment and a bill of particulars requesting the names of the victims and the nature of the threats made. On November 10, 1980, the Government provided Defendant with the names of the victims involved but refused to provide any other information to specify what was the subject matter, amounts or dates of the extensions of credit for the offenses involved in the indictment. On November 14, 1980, hearings were held on Defendant's Motion to Dismiss, his Motion for Continuance and on all other pending motions. At that time, the trial court indicated that Defendant's Motion to Dismiss the Indictment had considerable merit but declined to rule on the motion in order to allow the Government an opportunity to try to find authorities which would distinguish authorities relied on by Defendant.[3]

The Government did try to find some authorities which would meet Defendant's objections based on the First Circuit's decision in *United States* v. *Tomasetta*, 429 F.2d 978 (1st Cir. 1970). (Government's Memorandum in Opposition to Defendant's Motion to Dismiss, filed November 18, 1980) But rather than risk an adverse ruling on De-

---

[3] Judge Swygert has reprinted the pertinent portions of the trial judge's concern with the sufficiency of the indictment in his dissent found at p. 19, note 2, of this Appendix.

fendant's motion, the Government immediately procured a new indictment and sought its own dismissal of the original indictment stating *inter alia* that the "superseding indictments . . . serve only to provide more information to each Defendant in the indictment." (Notice of Filing of Superseding Indictments, ¶19, filed November 19, 1980, Case No. 80-30062) The trial court granted the Government's motion to dismiss the original indictment on November 21, 1980, and declined to rule on Defendant's prior motion to dismiss the original indictment. On the same date, the Defendant was arraigned on the superseding indictment and the trial court again denied Defendant's motion for a continuance and renewed the trial setting for November 24, 1980.[4]

On November 18 and 21, 1980, six and three days before trial, the Government disclosed to the Defendant for the first time the basis for its allegation of an extension of credit. On those dates, the Government released to the Defendant grand jury transcripts and copies of checks written by the victims for heroin purchases. (Motion to Supplement the Record filed by the Government in the Seventh Circuit Court of Appeals) The only indication given to the Defendant as to the nature of the extension of credit involved in the indictment at issue prior to that time was the reference to "stolen merchandise" at the bond reduction hearing. At trial, the Government conceded that disputes over stolen merchandise did not qualify as "extensions of credit" as defined by 18 U.S.C. §894, and

---

[4] Several of the counts of the original indictment (Counts 7-15) were split off into separate indictments in the superseding indictments. Trial on these counts were deferred. Defendant was acquitted on the Counts tried on a later date on which he and his counsel had more time to prepare. No. 80-30063

relied solely on the bad checks for heroin purchases to satisfy that jurisdictional prerequisite.

On November 24, 1980, Defendant again filed motions for continuance based on the Speedy Trial Act and a motion to dismiss the superseding indictment. The trial court denied both motions and proceeded immediately to trial. At trial, the Defendant's principal defense to the shooting incident testified to by the two victims was that the reason for the shooting was because the Defendant was upset at the victims because they had allegedly stolen his washing machine.[5]

2. Appellate Court Proceedings.

After briefs and oral arguments, the Seventh Circuit released its opinion affirming Defendant's conviction on April 29, 1982, Judge Swygert dissenting. Defendant's counsel filed a Petition for Rehearing and Rehearing En Banc based in large part on a contrary decision issued by the Ninth Circuit Court of Appeals in *United States* v. *Arkus*, 675 F.2d 245, decided only six days prior to the Seventh Circuit's decision in this case. The Seventh Circuit ordered the Government to file a responsive brief. The United States Attorney's office in Springfield referred the matter to the Department of Justice in Washington because of the conflicting Ninth Circuit Court of Appeals' decision. In its brief, the Department of Justice acknowledged that it was partly responsible for the *Arkus* opinion because it took a position in that case which conflicts with the position taken in this case.

---

[5] This is an abbreviated statement of facts of the shooting incident because this Petition for Writ of Certiorari does not involve those facts and the facts are recited in the Seventh Circuit's Opinion.

> "We acknowledge that the government is partly to blame for the confusing *Arkus* opinion. The government there took a position that we now believe is untenable and that conflicts with the position that we are taking here. We have been authorized by the Office of the Solicitor General to say that this brief accurately reflects the views of the Department of Justice. (Brief For The United States In Response To Appellants' Petition For Rehearing, p. 13, fn. 8)

The Seventh Circuit denied the Petition for Rehearing and Rehearing en Banc, with Judge Swygert dissenting and Judge Harlington Wood not taking part in the proceedings.

BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

Jurisdiction was asserted in the trial court for violation of the federal offenses of 18 U.S.C. §§894 and 924(c).

ARGUMENT

I.

CERTIORARI IS WARRANTED TO CLARIFY THE CONFLICTING APPROACHES TAKEN BY THE THIRD AND SEVENTH CIRCUITS TO CONSTRUCTION OF THE SPEEDY TRIAL ACT.

This case calls for this Court's intervention to clarify conflicting approaches to construction of the Speedy Trial Act and to make that construction consistent with the flexible interpretation requested by both houses of Congress. In 1979, Congress expressed repeated concern that the Speedy Trial Act was being interpreted in "an unnecessarily stringent manner".

> "The Committee is troubled to find evidence which suggests that, not only is the Act being interpreted to deny it most of its inherent flexibility, it remains practically 'noninterpreted.'
>
> * * *
>
> The point of that example is that the principal actors in the Federal criminal justice system are, for a variety of reasons, interpreting those provisions of the Act in an *unnecessarily inflexible* manner.
>
> * * *
>
> *. . . Neither hostility toward the Act nor fear of the consequences is a justifiable basis for interpretation which is so strict as to deny the spirit of it as well as its letter in application.*
>
> * * *
>
> The Committee must stress, at this juncture, that no amendment short of repeal and no amount of interpretive language could conceivably meet every objection and solve every problem arising from the Act's

> application in a practical setting. To attempt to do so would so construct the Act as to hamstring its inherent flexibility and defeat its principal aims as a consequence. While the Administrative Office has demonstrated diligence and good faith in its efforts to guide the districts toward a reasonable application of the Act in practice, *the Committee finds that, too often, the Administrative Office has erred on the side of caution. Legislative History of Title I of the Speedy Trial Act of 1974*, A. Partridge, pp. 111-112. (Emphasis added)

The Seventh Circuit's mechanistic construction of the Speedy Trial Act prevents application of §3161(d)(1) of the Act where the indictment was *tactically* dismissed on the Government's motion.[6] In reality the dismissal was attributable to the Defendant's motion to dismiss an invalid indictment which did not inform the Defendant or his counsel of the nature of the charges against him. Judicial approval of a tactic of re-indictment designed to prevent adequate preparation for trial is directly contrary not only to congressional intent that the spirit rather than the letter of the Act be followed, but also to the Third Circuit's recent opinion in *United States* v. *Rabb*, 680 F.2d 294 (3rd Cir. 1982), mandating a common sense practical interpretation to the Act.

---

[6] The particular finding of the Seventh Circuit Majority was as follows:

> In this case, although Cornbread filed his motion before the government filed a superseding indictment and moved to dismiss the original indictment, the trial judge never decided Cornbread's motion. While we note that the trial judge indicated some preliminary doubts as to whether the original indictment was sufficient, we decline to speculate as to how the motion would have ultimately been resolved. Accordingly, the original indictment was not dismissed on the defendant's motion and, thus, § 3161(d)(1) is not applicable.

The Third Circuit's decision in *United States* v. *Rabb*, 680 F.2d 294 (3rd Cir. 1982), is diametrically opposed to the Seventh Circuit's decision in this case. In *Rabb*, the Government obtained a superseding indictment because of a technical defect in the original indictment.[7] The Defendant then moved to dismiss the superseding indictment because it was not brought within the mandatory thirty (30) day period allowed between arrest and indictment set forth in §3161(b) of the Speedy Trial Act. The Third Circuit Court of Appeals, rather than woodenly applying the provisions of the Speedy Trial Act as the Seventh Circuit did in this case, analyzed the purpose of the specific provision of the Act at issue.

> "Viewed in light of its purpose in the statutory scheme and with 'an eye to the surrounding statutory landscape,' United States v. Bass, 404 U.S. 336, 344 92 S.Ct. 515, 521, 30 L.Ed.2d 488 (1971), *we conclude that appellee's reading of §3161(b), although literally correct, is unsound*, and that the August 10 indictment met the requirements of §3161(b). *United States* v. *Rabb*, 680 F.2d 294, 296 (3rd Cir. 1982) (Emphasis added)

In *Rabb*, the Third Circuit specifically took on the task of *evaluating* the *sufficiency* of the *original indictment* to determine whether or not the defendant was unfairly prejudiced by the delay from the original arrest to re-indictment. Only after making specific findings that the original indictment was sufficiently detailed to inform the defendant of the *exact* nature of the charges he would have to defend against and that it was returned by an indepen-

---

[7] The defect was that the Grand Jury's term had expired prior to the return of the indictment and the United States Attorney had neglected to obtain an order extending its term.

dent body based on a finding of probable cause, the Third Circuit held

> ". . . that in the absence of bad faith on the part of the government or prejudice to the defendant, an indictment returned by a grand jury whose term has expired is sufficient to toll Speedy Trial Act § 3161(b) if it is followed by a valid indictment, identical in all material respects." *United States* v. *Rabb*, 680 F.2d 294, 297 (3rd Cir. 1982)

Here the Seventh Circuit specifically *declined* to examine the validity of the original indictment, notwithstanding *material* differences between the two indictments, prejudice to the Defendant and Government bad faith in misleading defendant as to the nature of the charges.

The only distinction between the substantive evaluation and statutory construction of the Speedy Trial Act employed in *Rabb* and the Seventh Circuit's mechanistic approach employed in this case is that in *Rabb* the substantive evaluation to statutory construction was urged on behalf of the Government while here it is urged on behalf of the Defendant. Surely this Court in its supervisory role in the uniform administration of the federal criminal justice system, and as the final national arbiter of federal law, cannot allow such a distinction to stand.

Clarification of the proper approach that is to be used in statutory construction of the Speedy Trial Act is imperative at this time to guide the Courts of Appeal in their construction of the Act. The mandatory dismissal sections of the Speedy Trial Act, 18 U.S.C. §3162 only became effective to indictments filed after July 1, 1980. (18 U.S.C. §3163) This means that the Circuit Courts of Appeal are just beginning to be faced with what will surely be an avalanche of litigation regarding construction of the

Act. The question of whether a purely literal approach or an informed construction is to be given to the Speedy Trial Act will have to be faced repeatedly in the very near future. This Court's guidance is urgently needed, not only to clarify the conflict between the Third and Seventh Circuits' approaches to construction of the Act, but also to forestall a crazy quilt of conflicting approaches by all the Circuit Courts of Appeal in the near future.

The diametrically opposed positions taken by the Third and Seventh Circuits highlight the urgent need for this Court to fill the judicial vacuum noted by Congress in construction of the Act so that there can be an effective and consistent approach taken by the lower courts in construing the Act.

II.

REVIEW IS WARRANTED BY THIS COURT IN THE EXERCISE OF ITS SUPERVISORY ROLE TO PREVENT JUDICIAL EROSION ON CONGRESS' MANDATE TO ALLOW A DEFENDANT SUFFICIENT TIME TO ADEQUATELY PREPARE A DEFENSE.

This case also cries out for judicial review to prevent the Seventh Circuit's decision in this case from becoming a license to the Government to subvert Congress' express intent to allow a defendant additional time to prepare a defense where the Government has prepared an invalid indictment. The express wording of §§3161(d) and 3161 (c)(2) of the Speedy Trial Act is dispositive of Congress' intent to provide thirty (30) additional days to prepare for trial where an indictment is dismissed on motion of defendant. However, the result reached in this case is directly contrary to this express legislative intent *and* to the clear implication of this Court's recent decision in

United States v. *MacDonald*, ... U.S. ....., 102 S.Ct. 1497, 71 L.Ed.2d 696, n. 12 (1982), that the Government may not dismiss and later reinstitute charges to evade the Speedy Trial Guarantees.

Here the Government, now with the Seventh Circuit Court of Appeal's imprimatur, did precisely what was condemned in *MacDonald*. It sought dismissal of the original indictment and reinstituted new charges solely to avoid the mandate of the Speedy Trial Act guaranteeing a defendant the right to an additional period of preparation in the event of an invalid indictment or other matters mandating dismissal of the original indictment. The conduct of the Government in this case was, as Judge Swygert points out, deplorable. The Government requested the trial court to defer ruling on Defendant's motion to dismiss while it allegedly sought to find authorities which would support the original indictment. (Tr. 11/14/80, p. 40) Instead it sought a new indictment "to provide more information to each Defendant" thereby conceding the invalidity of the original indictment.[8] Until six days before trial, the Government concealed from the Defendant the essential element of the offense that the crime charged related to bad checks and nonrepayment of heroin debts. Until that time, the Government had affirmatively misled the Defendant into believing that the charges related to a dispute over stolen merchandise — not only was that a completely different crime from that which was alleged on the superseding indictment, but also it would not even be subject to federal jurisdiction as lacking the essential ele-

[8] This was further compounded by the Government's arguing that the validity of the original indictment was moot due to the fact it claimed that the deficiencies of the original indictment were now supplied in the superseding indictment.

ment of an extension of credit. *Perez* v. *United States*, 402 U.S. 146 (1971) At trial, the Defendant's whole defense was to contend that the shooting related to Defendant's dismay at the victims having stolen his washing machine. His attorney was taken by complete surprise by the new allegations of bad checks and narcotics transactions.

> "They changed the indictment now. They didn't give me a date when this transaction took place, when the credit was extended. They say the exact date unknown. They are saying there was a transaction involving narcotics. I haven't had any time since getting this indictment to discuss this with my client to find out if there's any truth to this particular indictment at all, and to what his particular defense would be. I am expected to go to trial Monday morning on this, and I—I just think that's grossly unfair. I won't have any chance to investigate whether he has alibi witnesses for these particular offenses, what he's talking about, whether there was any extension of credit at that time or not. It—it's just—it's inconceivable that they would want us to go to trial on such short notice and take it up. (Tr. 11/21/80, pp. 37-38)

This case demands exercise of this Court's supervisory responsibilities to prevent wholesale erosion of the Congress' intent in amending the Speedy Trial Act in 1979 to ensure adequate preparation time for trial. Allowance of the majority's decision of the Seventh Circuit to stand in this case authorizes the Government to file patently invalid indictments with no essentials of the offense and then substitute valid indictments for them on the eve of trial. This completely nullifies Congress' intent in making the amendments to the Speedy Trial Act in 1979 which added §3161(c)(2) to the Act. This section specifies that a defendant may not be forced to trial within less than thirty (30) days without his consent. This concern for

allowing a defendant adequate time to prepare his defense was reiterated over and over again in the Legislative History of the Act in *both* houses of Congress.

> "It is in recognition of the special problems often faced by defense counsel that the Department has included a provision in its bill requiring a minimum of 30 days for defense preparation. This insures the defendant of some minimum preparation time even in the simplest case.
>
> * * *
>
> Both bills provide that trials cannot begin within 30 days unless the defendant consents. This provision is designed to give a defendant at least 30 days to prepare for trial and would prohibit a trial judge from setting a trial before that time.
>
> * * *
>
> Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:
>
> * * *
>
> (2) guaranteeing the defendant a reasonable period in which to obtain counsel and prepare for trial—30 days from the date the defendant appears through counsel or elects to proceed *pro se*, unless the defendant waives the right conferred [§3161(c)(2)] . . .
>
> Prohibiting trial less than 30 days after the date the defendant appears in a position to begin preparing his defense more fully protects basic due process rights." *Legislative History of Title I of the Speedy Trial Act of 1974*, A. Partridge, pp. 71, 72, 73.

The Seventh Circuit's majority opinion authorizing the Government to subvert a defendant's preparation time by filing superseding indictments immediately before trial emasculates Congress' expressed concern for adequate

preparation time for trial and results in a blatant transgression of the Congressional purpose in adding §3161 (c)(2) to the Speedy Trial Act in 1979.

III.

REVIEW IS WARRANTED TO RESOLVE A DIRECT CONFLICT BETWEEN CIRCUITS ON CONSTRUCTION OF THE SPEEDY TRIAL ACT ON WHETHER THE EXCLUSIONS PROVIDED IN §3161(h) ARE APPLICABLE TO THE 30 DAY MINIMUM PERIOD AS WELL AS TO THE 70 DAY MAXIMUM PERIOD OF §3161(c).

The Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals have come to diametrically opposed positions on the question of whether the exclusion periods provided in §3161(h) of the Speedy Trial Act, 18 U.S.C. §3161(h), are applicable to the thirty (30) day minimum trial preparation period set forth in §3161(c)(2) of the Act as well as to the seventy (70) day maximum indictment to trial limitation set forth in §3161(c)(1) of the Act. In this case, the Seventh Circuit determined that neither the Defendant's applicable exclusions under §3161 (h) nor the fact of reindictment was sufficient to toll the minimum thirty (30) day preparation period provided by §3161(c)(2) of the Speedy Trial Act.[9] However, in *United*

[9] According to the provisions of §3161(h), Defendant had at least two exclusions which were applicable to him in determining the maximum seventy (70) day limitation period under §3161(c)(1). Defendant's thirty (30) day hospitalization was excludable under §3161(h)(1)(H) and an additional fourteen (14) days, during which the trial court held the Defendant's motion to dismiss under advisement, was excludable under §3161(h)(1)(F). Therefore, there were only sixteen (16) days of nonexcludable time between the time of the Defendant's first appearance with counsel on September 25, 1980 and the time of trial on November 24, 1980.

States v. *Arkus*, 675 F.2d 245 (9th Cir. 1982) the Ninth Circuit Court of Appeals came to precisely the opposite conclusion.

> "It [the Government] argues also that Arkus' trial began at the earliest possible time because it could not begin after reindictment for 30 days, absent an express waiver. 18 U.S.C. §3161(c)(2) (Supp. III 1979). Because we agree with the latter contention, we need not address what constitutes an 'essential witness.'
>
> * * *
>
> In the case of a reindictment, a defendant may in fact need less time to prepare his defense because some preparation was undertaken before the original indictment was dismissed. Nevertheless, given that the period between dismissal of the original indictment and reindictment may be considerable, *we believe Congress intended that the 30-day period apply also in cases of reindictment. United States* v. *Arkus*, 675 F.2d 245, 247-8 (9th Cir. 1982) (Emphasis added)

The *Arkus* opinion also decided that the thirty (30) day minimum preparation time was also equally applicable to other exclusion periods provided in §3161(h). In making this conclusion, the Ninth Circuit relied on the explicit Legislative History of the Act.

> "See note 3 supra. The Senate Committee Report accompanying the amendments adding the 30 day provision states:
>
> > *It is the Committee's intent that the exclusions provided in Section 3161(h) apply to the 30-day minimum to-trial provision.* Therefore, if an event occurs which would automatically exclude time under subsection (h), . . . that time is not only excluded from computing the time within which the trial must occur . . . but time would also auto-

> matically be excluded in computing the 30-day minimum period of time, during which the judge could not schedule trial without the defendant's consent.
>
> A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 73-74 (1980). *United States* v. *Arkus*, 675 F.2d 245, 248 (9th Cir. 1982) (Emphasis added)

Review by *certiorari* is the only way to clarify this important conflict in application of the Speedy Trial Act. As the *Arkus* case indicates, the issue appears both in cases in which a defendant is seeking a continuance and in which he is alleging violation of his right to a speedy trial. Trial courts throughout the country are placed at the horns of a dilemma: if they follow the Ninth Circuit's decision ensuring that a defendant has thirty (30) days preparation for trial, they will automatically be in violation of the Seventh Circuit's determination that a defendant must be brought to trial within seventy (70) days of an original indictment. This can only create judicial chaos in the ubiquitous speedy trial issues that are now appearing in the lower Courts.[10] Certiorari is warranted to clarify this fundamental difference between circuits.

---

[10] Another sign of the burgeoning conflict is the Fourth Circuit's very recent decision in *United States* v. *Wooten*, ≠81-5266-81-5268, decided September 3, 1982. There the Fourth Circuit decided exclusions provided in §3161(h) of the Act were not applicable to the minimum thirty (30) day preparation period set forth in §3161 (c)(2) notwithstanding the contrary legislative history and the Ninth Circuit's opinion in *United States* v. *Arkus*, 675 F.2d 245 (9th Cir. 1982).

CONCLUSION

The Seventh Circuit's majority opinion rendered in this case manifests a blatent erosion of Congress' intent to provide a defendant with adequate preparation time for trial. It is inconsistent with the Third Circuit Court of Appeals construction of the Speedy Trial Act and with that of the Ninth Circuit Court of Appeals. Review by this Court is warranted to clarify these inconsistencies and for all of the reasons stated herein. The defendant respectfully requests that this Court grant certiorari to review these important issues.

Respectfully submitted,

ALEXANDRA DE SAINT PHALLE
LONDRIGAN & POTTER, P.C.
1227 South Seventh Street
Post Office Box 399
Springfield, Illinois 62705
Telephone: 217/544-9823

CASEY & CASEY
Attorneys at Law
2020 Timberbrooke
Springfield, Illinois 62702
Telephone: 217/787-1536

Attorneys for Petitioner,
Edward Lee Horton